No. 10-1491

FILED
JUN 17 2011

In The
Supreme Court of the United States

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, individually and on behalf of his late father, CLEMENT TUSIMA,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC, SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICI CURIAE* PROFESSORS OF LEGAL HISTORY WILLIAM R. CASTO, MARTIN S. FLAHERTY, ROBERT W. GORDON, NASSER HUSSAIN, AND JOHN V. ORTH IN SUPPORT OF PETITIONERS

TYLER R. GIANNINI
Counsel of Record
SUSAN H. FARBSTEIN
INTERNATIONAL HUMAN RIGHTS CLINIC
HARVARD LAW SCHOOL
Pound Hall 401
1563 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-9263
giannini@law.harvard.edu
Attorneys for Amici Curiae

June 17, 2011

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE TEXT, PURPOSE, AND HISTORY OF THE ALIEN TORT STATUTE SHOW THAT CONGRESS DID NOT INTEND TO EXEMPT ANY CLASS OF DEFENDANT 5

A. The Framers Intended the Alien Tort Statute to Provide Aliens With a Broad Remedy for Violations of the Law of Nations 6

B. The Text of the Alien Tort Statute Specifies a Class of Plaintiffs But Does Not Limit the Defendants Against Whom the Remedy Can Be Enforced 8

II. AS THE MODERN CORPORATION EMERGED, COURTS USED DOMESTIC COMMON LAW TO ALLOCATE LOSSES AGAINST CORPORATIONS FOR INJURIES COMMITTED BY THEIR AGENTS 9

TABLE OF CONTENTS – Continued

Page

A. Historically, Courts Employed Domestic Common Law to Allocate Damages to Juridical Entities for Violations of the Law of Nations 12

1. Before the time of the Alien Tort Statute, the East India Company was sued for its agents' torts in violation of the law of nations 13

2. At the time of the Alien Tort Statute, ships and ship owners were held liable for captains' offenses against the law of nations based on domestic legal principles 16

B. Corporate Liability for the Modern Corporation Developed as the Means of Allocating Losses for Torts Committed by Corporate Agents 19

1. As private business corporations emerged, so did corporate liability under the domestic common law 20

2. Corporate liability is not a norm of conduct, but a principle of loss allocation to juridical principals for agents' torts 22

CONCLUSION 24

APPENDIX A

List of *Amici Curiae* ..... App. 1

TABLE OF AUTHORITIES

Page(s)

CASES

Adams v. Wiscasset Bank, 1 Me. 361 (Maine 1821) 21

Bank of Columbia v. Patterson's Adm'r, 11 U.S. 299 (1813) 23

Bolchos v. Darrel, 3 F. Cas. 810, (No. 1,607) (D. S.C. 1795) 9

Booth v. L'Esperanza, 3 F. Cas. 885, (No. 1,647) (D. S.C. 1798) 13

Chestnut Hill & Springhouse Tpk. Co. v. Rutter, 4 Serg. & Rawle 6 (Pa. 1818) 20, 22, 23

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 7

Dean v. Angus, 7 F. Cas. 297, (No. 3,702) (Adm. Pa. 1785) 17, 18

Doss v. Secretary of State for India in Council, (1874-75) L.R. 19 Equ. 509 (Ch.) 15

Dutton v. Howell, (1693) 1 Eng. Rep. 17 (H.L.) 16

Eachus v. Trustees of the Illinois & Michigan Canal, 17 Ill. 534 (1856) 14

The General Steam Navigation Co. v. Guillou, (1843) 152 Eng. Rep. 1061; 11 M. & W. 877 23

Head & Amory v. Providence Ins. Co., 6 U.S. 127 (1804) 22

Henfield's Case, 11 F. Cas. 1099, (No. 6,360) (C.C.D. Pa. 1793) 10

TABLE OF AUTHORITIES – Continued

Page(s)

Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *reh'g denied*, No. 06-4800-CV, 2011 WL 338048, 2011 WL 338151 (2d Cir. Feb. 4, 2011) ..... *passim*

The Little Charles, 26 F. Cas. 979, (No. 15,612) (C.C.D. Va. 1818) 17, 18, 19

The Lively, 15 F. Cas. 631, (No. 8,403) (C.C.D. Mass. 1812) 17

The Malek Adhel, 43 U.S. (2 How.) 210 (1844) 18, 19

The Marianna Flora, 24 U.S. (11 Wheat.) 1 (1825) 17

The Mary Ford, 3 U.S. (3 Dall.) 188 (1796) 11, 13

McCready v. Philadelphia Guardians of Poor, 9 Serg. & Rawle 94 (Pa. 1822) 21

Moodalay v. The East India Company, (1785) 28 Eng. Rep. 1245 (Ch.); 1 Bro. C.C. 469 ..... 14, 15

Mostyn v. Fabrigas, (1774) 98 Eng. Rep. 1021 (K.B.); 1 Cowp. 160 16

Moxon v. The Fanny, 17 F. Cas. 942, (No. 9,895) (D. Pa. 1793) 9

Nabob of Arcot v. The East India Company, (1793) 29 Eng. Rep. 841 (Ch.); 4 Bro. C.C. 181 15

The Nancy, 4 F. Cas. 171, (No. 1,898) (D. S.C. 1795) 11

The Palmyra, 25 U.S. (12 Wheat.) 1 (1827) 17, 18

The Paquete Habana, 189 U.S. 453 (1903) 13

TABLE OF AUTHORITIES – Continued

Page(s)

Purviance v. Angus, 1 U.S. (1 Dall.) 180 (Pa. Err. & App. 1786) 18, 19

The Resolution, 2 U.S. (2 Dall.) 1 (Fed. App. Pa. 1781) 16

Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (Oyer & Terminer Pa. 1784) 10

Riddle v. Proprietors of Merrimack River Locks & Canals, 7 Mass. 169 (1810) 20, 21

Romero v. Drummond Co., Inc., 552 F.3d 1303 (11th Cir. 2008) 5

Russell v. The Men of Devon, 100 Eng. Rep. 359 (1788); 2 T.R. 667 21

Seton, Maitland & Co. v. Low, 1799 WL 511 (N.Y. Sup. Ct. 1799) 18

Shelling v. Farmer, (1725) 93 Eng. Rep. 756; 1 Str. 646 15

The Case of Thomas Skinner, Merchant v. The East India Company, (1666) 6 State Trials 710 (H.L.) 13, 14

Smith v. Bank of Washington, 5 Serg. & Rawle 318 (Pa. 1819) 21

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) ..... *passim*

Talbot v. Commanders & Owners of Three Brigs, 1 U.S. (1 Dall.) 95 (Pa. Err. & App. 1784) 11, 18

Talbot v. Jansen, 3 U.S. (3 Dall.) 133 (1795) 11

Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) 2, 3, 10, 16

TABLE OF AUTHORITIES – Continued

Page(s)

Townsend v. Susquehanna Tpk. Rd. Co., 6 Johns. 90 (N.Y. Sup. Ct. 1810).....23

Wilson v. Rockland Mfg. Co., 2 Del. 67 (Del. Super. Ct. 1836).....23

U.S. STATUTES

Alien Tort Statute, 28 U.S.C. § 1350 .....1, 2, 6, 8

An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73 (1789).....2

An Act to Prohibit the Importation of Slaves into any Port or Place Within the Jurisdiction of the United States, 2 Stat. 426 (1807) 19

OTHER AUTHORITIES

1 Op. Att'y Gen. 57 (1795) 9

1 A. Grey, Debates of the House of Commons From the Year 1667 to the Year 1694 (1769).....14

3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 583 (J. Elliot ed. 1836) 7

4 William Blackstone, Commentaries on the Laws of England (1769) 9

21 Journals of the Continental Congress 1137 (1781) (G. Hunt ed. 1912) 7

26 Op. Att'y Gen. 250 (1907) 9

The Act for the Abolition of the Slave Trade, 1807, 47 Geo. 3, c. 36 (Eng.) 19

TABLE OF AUTHORITIES – Continued

Page(s)

Joseph K. Angell & Samuel Ames, *Treatise on the Law of Private Corporations Aggregate* (6th ed. 1858) 23

William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467 (1986) 7

William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 Am. J. Legal Hist. 117 (1993) 17

William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L. Rev. 221 (1996) 7

James Grant, *A practical treatise on the law of corporations in general* (1854) 23

Oliver Wendell Holmes, Jr., *The Common Law*, Lecture III (1881) 12

Morton J. Horwitz, *The Transformation of American Law 1780-1860* (1977) 20

Nasser Hussain, *The Jurisprudence of Emergency* (2003) 15, 16

W. Page Keeton et al., *Prosser & Keeton on Torts* (5th ed. 1984) 4, 21, 22

James Madison, Journal of the Constitutional Convention 60 (E. Scott ed. 1893) 6

TABLE OF AUTHORITIES – Continued

Page(s)

Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 11

Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. Rev. 641 (1989) 20

Henry Wheaton, *Elements of International Law*, Part First § 1 (8th ed. 1866) 11

INTERESTS OF THE *AMICI CURIAE*

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Petitioners.[1] *Amici* (listed in the Appendix) are professors of legal history who have an interest in the proper understanding and interpretation of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and of this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Among the *amici* are several who filed an *amicus curiae* brief in *Sosa*,[2] the position of which this Court adopted in Part III of its opinion. *See id.* at 713-14. The Second Circuit's majority opinion in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *reh'g denied*, No. 06-4800-CV, 2011 WL 338048, 2011 WL 338151 (2d Cir. Feb. 4, 2011), rejected the proposition that corporations may be held liable under the ATS for torts in violation of international law. *Amici* respectfully submit this brief to urge that this Court grant certiorari because the text, history, and purpose of the ATS show otherwise.

---

[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *amici*'s intention to file this brief. The parties have consented to the filing of this brief, and such consents have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

[2] The *amici* who have joined both briefs are William R. Casto, Robert W. Gordon, and John V. Orth.

SUMMARY OF ARGUMENT

In *Sosa*, this Court recognized the importance of the historical record with regards to analysis of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350.[3] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714-20 (2004). Congress adopted the ATS to provide plaintiffs a meaningful domestic remedy in federal court for violations of the law of nations. Creating a special exemption for corporate defendants as the Second Circuit did in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *reh'g denied*, No. 06-4800-CV, 2011 WL 338048, 2011 WL 338151 (2d Cir. Feb. 4, 2011), contradicts this original purpose of the statute as well as its plain text. In addition, the Second Circuit erred in concluding that "who is liable for what" is a matter of customary international law. *Id.* at 121-22. History shows that domestic law controlled such issues when considering violations of the law of nations. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J.,

---

[3] Section 9 of the First Judiciary Act, today known as the ATS, provided that the district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." An Act to Establish the Judicial Courts of the United States ("Judiciary Act"), ch. 20, § 9, 1 Stat. 73, 77 (1789). With small changes, it is now codified in 28 U.S.C. § 1350, but it has never been suggested that any change has altered the scope of the original provision. Because this brief is concerned with the original understanding of the ATS, discussion refers to the original text.

concurring). Thus, as the modern corporation emerged, courts applied domestic law to determine questions of corporate liability and allocate damages to such entities.

The First Congress enacted the ATS to afford a federal forum to discharge the duty of the nation, to avoid potentially hostile state courts, and to promote uniform interpretation when dealing with violations of the law of nations. Furthermore, the text of the ATS plainly places no limits on the type of defendant amenable to suit. The statute was intended to provide a meaningful civil remedy ("tort only") for "an alien." Thus, the statute restricts the identity of the plaintiff but not of the defendant. The statute also states that "all causes" are actionable for violations of international norms, which confirms the congressional intent to provide plaintiffs with broad remedies.

A historical understanding of the nature of the international legal system demonstrates that the norms that defined prohibited conduct under the ATS were drawn from the law of nations while enforcement questions, such as which particular defendant would be assessed damages, were drawn from the domestic common law. Thus, when the ATS was adopted, as now, questions of civil liability for violations of international norms were left "to each nation to resolve." *Kiobel*, 621 F.3d at 152, 183-84 (Leval, J., concurring); *see Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring).

The Second Circuit ignores this history of enforcement of the law of nations. *See Kiobel*, 621 F.3d at 119-20, 132-37 (relying on international tribunals to decide enforcement questions).[4] In contrast to the Second Circuit's ruling, the First Congress would have specifically understood that issues such as corporate liability, which is a form of loss allocation flowing from agency principles,[5] were defined by the domestic common law. *Cf. Kiobel*, 621 F.3d at 148. Corporate liability developed as a doctrine of domestic common law, not as a conduct-regulating norm, to assess liability to the master for the servant's torts. *See* W. Page Keeton et al., *Prosser & Keeton on Torts* § 69, at 500 (5th ed. 1984). Courts historically used domestic law to address questions of allocating losses to juridical entities for violations of the law of nations. An examination of cases against such entities, including the East India Company and ships, indicates that early courts and jurists were familiar with allocating losses

---

[4] International tribunals did not exist when the ATS was adopted. Thus, Congress could not have intended courts to look to enforcement at the international level to resolve issues such as corporate liability. Despite the absence of international tribunals, juridical entities were held liable for violations of the law of nations in national courts before and after the passage of the ATS.

[5] Loss allocation is "a deliberate allocation of a risk. The losses caused by the torts of employees . . . are placed upon the employer because, having engaged in an enterprise . . . and sought to profit by it, it is just that he, rather than the innocent injured plaintiff should bear them; and because he is better able to absorb them, and to distribute them. . . ." W. Page Keeton et al., *Prosser & Keeton on Torts* § 69, at 500 (5th ed. 1984).

to principals for their agents' actions. Only a handful of corporations existed when Congress enacted the ATS, and as the modern corporation emerged, courts applied established common law agency concepts to allocate loss and damages to the corporation (the principal) for the actions of its employees (the agents).

The Second Circuit fails to explain why the development of "liability of corporations for the actions of their employees or agents," *Kiobel*, 621 F.3d at 147, is not applicable in ATS suits in which the damage remedy is controlled by domestic law. History belies the view that such a question would have been defined by international law. We urge this Court to grant certiorari to correct the decision of the court below, which rests on a fundamental misunderstanding of the text, history, and purpose of the ATS, and to provide clarity to the lower courts on the question of corporate liability under the ATS. *Compare Kiobel*, 621 F.3d at 120, *with Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008) ("provid[ing] no express exception for corporations").

ARGUMENT

I. THE TEXT, PURPOSE, AND HISTORY OF THE ALIEN TORT STATUTE SHOW THAT CONGRESS DID NOT INTEND TO EXEMPT ANY CLASS OF DEFENDANT

In *Sosa*, this Court recognized the importance of history when interpreting the Alien Tort Statute

("ATS"), 28 U.S.C. § 1350. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714-20 (2004). The First Congress intended the statute to accomplish several goals, including to ensure plaintiffs a meaningful remedy in federal court and to forestall the appearance of American complicity in violations of the law of nations. The text of the ATS attains these goals through a mixture of expansive and restrictive terms, *Sosa*, 542 U.S. at 718, vesting the federal courts with jurisdiction to provide a common law damage remedy while omitting any restriction on the class of defendant subject to suit. Courts today should not read a corporate exemption into the ATS; to do so would be inconsistent with the statute's plain text and contrary to the drafters' original intent.

A. The Framers Intended the Alien Tort Statute to Provide Aliens With a Broad Remedy for Violations of the Law of Nations

Congress enacted the ATS in response to previous failures to provide foreign plaintiffs adequate redress for violations of the law of nations. Before its passage, "[t]he Continental Congress was hamstrung by its inability to 'cause infractions of treaties, or of the law of nations to be punished.'" *Sosa*, 542 U.S. at 716 (quoting James Madison, Journal of the Constitutional Convention 60 (E. Scott ed. 1893)). Congress was concerned that the United States "could not credibly disavow the misconduct of private individuals 'if regular and adequate punishment [was] not [ ]

provided against the transgressor.'" William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 490 (1986) (hereinafter Casto, *Law of Nations*) (quoting 21 Journals of the Continental Congress 1136 (1781)). In 1781, the Continental Congress "recommended [states] authorize suits to be instituted for damages by the party injured." 21 Journals of the Continental Congress 1137 (1781) (G. Hunt ed. 1912).[6]

State courts proved ineffective, however, and thus the need for a uniform federal remedy emerged. *See, e.g.*, 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 583 (J. Elliot ed. 1836) ("We well know, sir, that foreigners cannot get justice done them in these [state] courts. . . ."); *Sosa*, 542 U.S. at 716-17 (discussing 1784 Marbois Affair and inability of national government to vindicate violations of law of nations). The Judiciary Act, including the ATS, sought to provide a remedy for these violations by allowing foreigners to bring suit in federal court for civil damages. *See* Casto, *Law of Nations*, at 495; *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793).

---

[6] These provisions from the 1781 resolution are the direct precursors of the ATS. *See* Casto, *Law of Nations*, at 490-91; William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L. Rev. 221, 226-28 (1996).

B. The Text of the Alien Tort Statute Specifies a Class of Plaintiffs But Does Not Limit the Defendants Against Whom the Remedy Can Be Enforced

The text of the ATS reflects congressional intent to provide aliens a civil remedy for violations of the law of nations. *See Sosa*, 542 U.S. at 718. The ATS restricts the jurisdiction to causes arising under "the law of nations or a treaty of the United States" where the plaintiff is "an alien." Judiciary Act, ch. 20, § 9, 1 Stat. at 77. While the text of the ATS specifies what conduct comes within its reach (violations of the law of nations or a treaty of the United States), it expressly does not limit suits against any class of defendant, including corporations.

Had Congress intended to exempt particular defendants from ATS suits, it would have done so explicitly. In other sections of the Judiciary Act, Congress exercised its authority to limit the courts' jurisdiction and availability of a remedy in federal court by restricting the type of defendant or enumerating qualifying defendants. *See*, *e.g.*, Judiciary Act, ch. 20, § 11, 1 Stat. at 78-79 (limiting conduct and codifying $500 amount in controversy requirement); *id.* ch. 20, § 9, 1 Stat. at 76-77 (same); *id.* ch. 20, § 9, 1 Stat. at 76-77 (limiting defendants to "consuls or vice-consuls"). However, the ATS deliberately extended jurisdiction to "all causes" in tort for violations of the law of nations, regardless of the particular defendant sued. *Id.* ch. 20, § 9, 1 Stat. at 77.

To exclude an entire class of defendants from suit would run counter to the plain text of the ATS, which was crafted to provide aliens a broad civil remedy. Indeed, exempting a class of defendants requires reading words into the text that Congress simply did not write. No early interpreter did so, and neither should this Court. *See* 1 Op. Att'y Gen. 57 (1795) (not distinguishing among defendants);[7] *see also* 26 Op. Att'y Gen. 250 (1907) (finding corporation is proper defendant); *compare Kiobel*, 621 F.3d at 121-22 (excluding corporations).

II. AS THE MODERN CORPORATION EMERGED, COURTS USED DOMESTIC COMMON LAW TO ALLOCATE LOSSES AGAINST CORPORATIONS FOR INJURIES COMMITTED BY THEIR AGENTS

Historically, courts relied on federal common law to fill the interstices of the law of nations.[8] This

---

[7] In another matter, Darrel, acting as agent for a British mortgagee, seized and sold slaves who properly belonged to plaintiff Bolchos. *See Bolchos v. Darrel*, 3 F. Cas. 810, 810-11, (No. 1,607) (D. S.C. 1795). Although Darrel was an individual, it beggars belief that the district court would have decided differently and dismissed the case if the mortgagee had chosen a corporation as his agent. *See also Moxon v. The Fanny*, 17 F. Cas. 942, 942, (No. 9,895) (D. Pa. 1793).

[8] The founding generation would have been familiar with a mixture of remedies to address international offenses. *See Sosa*, 542 U.S. at 723-24, 723 n.16; *see also* 4 William Blackstone, Commentaries on the Laws of England *68 (1769) ("offences against the law of nations" comprehend both civil and criminal

(Continued on following page)

common law analysis included determining the manner in which losses and damages were allocated to particular defendants for violations of international law. English cases, which informed the drafters of the ATS and American courts, adopted this approach: domestic agency principles defined loss allocation. For example, under this enforcement regime, English courts allocated losses to the East India Company ("the Company") – a precursor to the modern business corporation – for violations of the law of nations. The American legal system then followed the same method to allocate losses to juridical entities, including ships and corporations.

Sosa recognized that the ATS employed an overarching approach that combined international law and domestic common law: the norm controlling the regulated conduct was defined by international law while remaining rules governing the scope of tort remedies were left to domestic common law. *Sosa*, at 720-21, 724; *see also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J.,

---

offenses). The Framers understood that the law of nations could be administered through different "methods of proceeding." *See Henfield's Case*, 11 F. Cas. 1099, 1117, (No. 6,360) (C.C.D. Pa. 1793) (speech of Attorney General Randolph). One such method was domestic criminal proceedings. For example, in *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 118 (Oyer & Terminer Pa. 1784), the court pronounced judgment in the Marbois affair without attempting to derive the sentence or the modes of proceeding from international law.

concurring).[9] Allocation of damages and losses is part of the tort remedy, and was viewed historically as a domestic question.

The Second Circuit's suggestion that corporate liability derives from the jurisprudence of international tribunals ignores history. *Kiobel*, 621 F.3d at 119-20, 132-37. Such an inquiry would have been unimaginable to the drafters of the ATS. There were no international tribunals when the ATS was adopted,[10] and thus Congress could not have intended courts to look to them for guidance.[11] Instead, courts administered the law of nations through domestic law to give effect to the proscriptions of international law. As modern

---

[9] This enforcement regime also occurred in legal arenas beyond the ATS. *See, e.g.*, *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 159 (1795) (rights of French privateer determined by law of nations; domestic law governs whether captain is properly considered privateer); *The Nancy*, 4 F. Cas. 171, 171, (No. 1,898) (D. S.C. 1795) (domestic law determines what degree of armament on ship violates neutrality); *The Mary Ford*, 3 U.S. (3 Dall.) 188, 190-91 (1796) (domestic law determines questions of allocation of salvage of abandoned ship).

[10] Henry Wheaton, *Elements of International Law*, Part First § 1, at 3 (8th ed. 1866).

[11] Recent international agreements have ceded jurisdiction over criminal violations of international law to international tribunals in limited circumstances, but such agreements have not divested nations' domestic courts of civil jurisdiction over international law violations. The notion of "complementarity" confirms that international tribunals only assume jurisdiction when domestic systems are unable or unwilling to enforce international norms. Rome Statute of the International Criminal Court, art. 17, July 17, 1998, 2187 U.N.T.S. 3.

business corporations emerged, domestic agency law – not international law – defined corporate liability, and courts allocated losses to corporations for tort violations.

A. Historically, Courts Employed Domestic Common Law to Allocate Damages to Juridical Entities for Violations of the Law of Nations

In *Kiobel*, the Second Circuit erred in two regards. First, in saying that "customary international law . . . has *never* extended the scope of liability to a corporation," *Kiobel*, 621 F.3d at 120, the court ignored the history of cases beginning as early as 1666 against the East India Company. Second, the court erred in concluding that "who is liable for what" is a matter of customary international law. *Kiobel*, 621 F.3d at 122; *cf. Kiobel v. Royal Dutch Petroleum Co.*, No. 06-4800-CV, 2011 WL 338151 (2d Cir. Feb. 4, 2011) (Katzmann, J., dissenting) (rejecting proposition that which *type of defendant* can be liable for what is a question of international law). Historically, once the cause of action was brought within the common law, the common law determined who was liable. *See generally* Oliver Wendell Holmes, Jr., *The Common Law*, Lecture III (1881). Following this maxim, early English and American courts adjudicating violations of the law of nations applied domestic agency principles to allocate liability to juridical entities for their

agents' actions.[12] This approach continued through the American jurisprudence of the nineteenth century. For example, Justice Holmes allocated damages for the wrongful seizure of The Paquete Habana, reasoning that domestic law governed the "form of procedure" by which damages for the illegal forfeiture would be allocated. *The Paquete Habana*, 189 U.S. 453, 465 (1903).

1. Before the time of the Alien Tort Statute, the East India Company was sued for its agents' torts in violation of the law of nations

Historically, English domestic law governed the East India Company's liability for violations of the law of nations. In 1666, Thomas Skinner sued the Company in London for "robbing him of a ship and goods of great value, . . . assaulting his person to the danger of his life, and several other injuries done to him" by Company agents in India. *The Case of Thomas Skinner, Merchant v. The East India Company*, (1666) 6 State Trials 710 (H.L.) 711. Skinner's claims

---

[12] In *Booth v. L'Esperanza*, Judge Bee used a combination of domestic agency law and the law of nations to determine possession of a prize of war. By the law of nations, "the captors acquired such a right [to the vessel] as no neutral nation could impugn, or destroy." 3 F. Cas. 885, 885, (No. 1,647) (D. S.C. 1798) (quoting *The Mary Ford*, 3 U.S. at 198). Bee, however, applied "the laws of this state," South Carolina, to find that the actions of a slave following his master's orders maintained the master's possession of the vessel. *Id.* at 885-86.

were based, in part, on violations of the law of nations on the high seas. *Id.* at 719 ("the taking of his ship, a robbery committed *super altum mare*"). The House of Lords feared that failure to remedy acts "odious and punishable by all laws of God and man" would constitute a "failure of justice." *Id.* at 745. Faced with "a poor man oppressed by a rich company," *id.*, the Lords decreed that the "Company should pay unto Thomas Skinner, for his losses and damages sustained, the sum of 5,000*l*," *id.* at 724. The Lords implicitly rejected the Company's argument that it could not be held liable for the torts of its agents. *Id.*; *see also id.* at 713-14 (Company conceding corporate liability for agents' acts undertaken with Company "order or knowledge" but arguing no order existed here).[13] Other English courts similarly understood the East India Company to be subject to liability for its agents' acts under English law. *See Moodalay v. The East India Company*, (1785) 28 Eng. Rep. 1245 (Ch.) 1246;

---

[13] The East India Company contested both the jurisdiction of the Lords as a court of original, as opposed to appellate, jurisdiction, 6 State Trials at 718-19, and the jurisdiction of English courts for claims created overseas, 1 A. Grey, Debates of the House of Commons From the Year 1667 to the Year 1694, at 152 (1769). However, the Company *never* suggested that its corporate form completely exempted it from liability. Charles II ultimately brokered a political settlement that vacated the judgment, on grounds that "when the Lords fined and imprisoned persons for complaining by petition to the House of Commons, it was a breach of their privilege." 6 State Trials at 768. American courts understood *Skinner* to hold that "the courts could give relief" for torts committed by the Company through its agents, "notwithstanding these were done beyond the seas." *Eachus v. Trustees of the Illinois & Michigan Canal*, 17 Ill. 534, 536 (1856).

1 Bro. C.C. 469, 470 ("I thought the cases of a corporation and of an individual were different; but I am glad to have the authority of Lord Talbot, that they are not."); *Shelling v. Farmer*, (1725) 93 Eng. Rep. 756; 1 Str. 646 (discussing settlement between East India Company and individual for "injuries by the Company's agents").

Use of the domestic doctrine of sovereign immunity as an affirmative defense reinforces that English courts presumed an antecedent potential for liability for certain acts of the East India Company. For example, when the Nabob of Arcot sued the Company to collect debts owed under a treaty, the court held that "the Nabob treated with the *India* Company as with an independent sovereign," rendering the debts a "political transaction" and the Company immune. *Nabob of Arcot v. The East India Company*, (1793) 29 Eng. Rep. 841 (Ch.) 849; 4 Bro. C.C. 181, 199. Absent sovereign immunity, however, the *Nabob* court presumed that the Company could have been held liable.[14] *Id.* at 849; *see Moodalay*, 28 Eng. Rep. at 1246 (the Company "have rights as Sovereign Power, they have also duties as individuals" and can be subject to liability).[15] Thus, with regards to the East India

---

[14] Subsequent cases show sovereign immunity shielded the Company from liability for much of its agents' conduct. *See, e.g., Doss v. Secretary of State for India in Council*, (1874-75) L.R. 19 Equ. 509 (Ch.).

[15] In other circumstances, sovereign immunity did not apply. It was no bar to suing the Company for trespass in cases of wrongful detention. Nasser Hussain, *The Jurisprudence of Emergency* 81 (2003). Judges issued writs of habeas corpus against the

(Continued on following page)

Company – a precursor to the modern business corporation – the corporate form granted no exemption to liability.

2. At the time of the Alien Tort Statute, ships and ship owners were held liable for captains' offenses against the law of nations based on domestic legal principles

Like corporations, ships were juridical entities that owners used to transact business. Courts, through domestic *in rem* jurisdiction, enforced claims against ships for violations of the law of nations.[16]

Company, which incurred liability for its agents' wrongful detentions. *Id.* at 73-74.

Like corporations, British governors were created and empowered by letters patent – sovereign delegations under domestic law. *See, e.g., Dutton v. Howell*, (1693) 1 Eng. Rep. 17 (H.L.). Governors had duties and could incur tort liability if they abused power. *Id.*; *see also Mostyn v. Fabrigas*, (1774) 98 Eng. Rep. 1021 (K.B.); 1 Cowp. 160, 161 (case against British governor of Minorca for assault, false imprisonment, and banishment where liability was defined by common law); *see generally* Hussain, at 75-76 (discussing liability of governors). As a general matter, once English law reached the relevant jurisdiction, such as a colony, questions of remedy were defined by English domestic law. *Dutton*, 1 Eng. Rep. at 22-23. The law of nations determined questions such as when a colony was considered "occupied" by the Crown, and English law operated to enforce international law's guarantees. *Id.*

[16] Domestic adjudication affirms Judge Edwards' approach in *Tel-Oren*. *See, e.g., The Resolution*, 2 U.S. (2 Dall.) 1, 4-5 (Fed. App. Pa. 1781) (stating domestic courts are proper venues for

(Continued on following page)

See The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827) (discussing *in rem* jurisdiction); *see also* William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 Am. J. Legal Hist. 117, 128-29, 136 (1993) (discussing importance of federal institutions adjudicating maritime questions involving law of nations). Domestic law defined how losses were allocated to the juridical entity of the ship for its agents' actions.

Plaintiffs brought claims for violations of the law of nations against juridical entities like ships. As Justice Story noted in *The Marianna Flora*, "piratical aggression by an armed vessel . . . may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations." 24 U.S. (11 Wheat.) 1, 40-41 (1825); *see also Dean v. Angus*, 7 F. Cas. 294, 297, (No. 3,702) (Adm. Pa. 1785) (case involving invalid capture of The Betsey brought "against the brigs . . . and against certain persons . . . as owners and captains of the said brigs"); *The Palmyra*, 25 U.S. (12 Wheat.) at 14 ("The thing is here primarily considered the offender, or rather the offence is attached primarily to the thing."). In *The Little Charles*, 26 F. Cas. 979, 982, (No. 15,612) (C.C. Va. 1818), Chief Justice Marshall explained:

---

assessing validity of captures and damages); *The Lively*, 15 F. Cas. 631, 632-34, (No. 8,403) (C.C.D. Mass. 1812) (same).

> [I]t is a proceeding against the vessel, for an offence committed by the vessel. . . . It is true, that inanimate matter can commit no offense. The mere wood, iron, and sails of the ship, cannot, of themselves, violate the law. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master.

Justice Story articulated the rationale for suits against ships, stating that admiralty treated "the vessel . . . as the offender," which "is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party." *The Malek Adhel*, 43 U.S. (2 How.) 210, 233-34 (1844) (relying on *The Palmyra* and *The Little Charles*).

Courts allocated damages among defendants based on domestic principles.[17] For example, in 1779, Silas Talbot, a British citizen, lawfully captured a prize of war. When American captains seized Talbot's prize in violation of the law of nations, Talbot successfully sued the American ships' owners. *Talbot v. Commanders & Owners of Three Brigs*, 1 U.S. (1 Dall.) 95 (Pa. Err. & App. 1784); *Dean*, 7 F. Cas. 294; *Purviance v. Angus*, 1 U.S. (1 Dall.) 180 (Pa. Err. & App. 1786). Using domestic principles, the court affirmed a

---

[17] Similarly, insurance companies were not exempt from judgments interpreting the law of nations – nor did they ever argue as much. *See, e.g.*, *Seton, Maitland & Co. v. Low*, 1799 WL 511 (N.Y. Sup. Ct. 1799).

partial judgment against one captain for the losses of the owners. *Purviance*, 1 U.S. at 183-85; *see also id.* at 185 (Rush, J., dissenting).[18] Other cases similarly affirmed the use of domestic principles when allocating damages. *See, e.g.*, *The Malek Adhel*, 43 U.S. at 233 (claim against ship for crew's actions considered "without any regard whatsoever to the personal misconduct or responsibility of the owner thereof"); *The Little Charles*, 26 F. Cas. at 982 (case against ship for crew's actions "does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner").

B. Corporate Liability for the Modern Corporation Developed as the Means of Allocating Losses for Torts Committed by Corporate Agents

When English courts first grappled with the liability of the East India Company, the use of the corporate form to organize a business was rare. Nevertheless, the English courts determined that the Company was liable for its agents' torts. As modern corporations proliferated and their purposes expanded

---

[18] Domestic law also allocated responsibility for slave trading through the ship to the owners, insurers, and other principals. *See* The Act for the Abolition of the Slave Trade, 1807, 47 Geo. 3, c. 36 (Eng.); An Act to Prohibit the Importation of Slaves into any Port or Place Within the Jurisdiction of the United States, 2 Stat. 426 (1807).

in the United States, American courts reached the same conclusion. In particular, courts came to understand that corporate tort was not a corporate action per se, but a way of allocating damages to the corporation for the torts committed by its agents – just as courts had done with ships. *See* Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. Rev. 641, 649-51 (1989).

1. As private business corporations emerged, so did corporate liability under the domestic common law

Business corporations were rare at the time the Framers adopted the ATS. "The archetypal American corporation of the eighteenth century is the municipality, a public body charged with carrying out public functions." Morton J. Horwitz, *The Transformation of American Law 1780-1860* 112 (1977); *see also* Schwartz, at 648. In 1780, "colonial legislatures had conferred charters on only seven business corporations, and a decade later that number had increased to but forty." Horwitz, at 112.

With the emergence of the modern business corporation, U.S. domestic common law adopted the approach used earlier in England. *See* Schwartz, at 649-51. Doctrinally, by the early nineteenth century, courts had severed corporate liability from the precondition of capias and dismissed the fiction that all torts were frolics. *See Riddle v. Proprietors of Merrimack River Locks & Canals*, 7 Mass. 169, 178, 185

(1810) (although corporation cannot be imprisoned, it may be liable for damages or amercement for trespass); *Chestnut Hill & Springhouse Tpk. Co. v. Rutter*, 4 Serg. & Rawle 6, 13 (Pa. 1818) ("some actions of trespass might, at common law, be maintained against aggregate corporations"). Similarly, courts recognized the modern corporation's funds should be allocated losses for torts attributable to the corporation.[19] *See* W. Page Keeton et al., *Prosser & Keeton on Torts* § 69, at 500 (5th ed. 1984); *see also Adams v. Wiscasset Bank*, 1 Me. 361, 364 (Maine 1821) (losses assessed against bank's corporate fund); *Smith v. Bank of Washington*, 5 Serg. & Rawle 318, 319-20 (Pa. 1819) (corporate form means bank's "responsibility is limited to its own funds"); *Riddle*, 7 Mass. at 187-88 (corporate liability should be extended to general corporations with funds to pay damages); *cf. McCready v. Philadelphia Guardians of Poor*, 9 Serg. & Rawle 94, 97 (Pa. 1822) (damages for breach of corporate duty cannot be maintained against those without corporate fund).

---

[19] Corporate funds distinguished the modern business corporation from its historical predecessor, the public corporation. In *Russell v. The Men of Devon*, Lord Kenyon held that the plaintiff could not recover against Devon for personal injuries because a public corporation had no "corporation fund" from which to pay damages. 100 Eng. Rep. 359 (1788) 362; 2 T.R. 667, 672. A finding of liability would have forced the incorporators to pay damages. *See id.*

2. Corporate liability is not a norm of conduct, but a principle of loss allocation to juridical principals for agents' torts

Concomitant with the establishment of the modern business corporation and dismissal of the frolics fiction, courts assessed damages against corporations for employees' torts. *See Chestnut Hill*, 4 Serg. & Rawle at 12. Corporate liability was not considered conduct, but rather a means of allocating losses to corporate principals for agents' torts – a question of remedy akin to loss allocation regarding ships. Imposing responsibility on the corporation for the acts of tortious employees did not, as the Second Circuit held, "impose[ ] responsibility . . . on a wholly new defendant – the corporation." *Kiobel*, 621 F.3d at 147. Rather, "[t]he losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon the enterprise itself, as a required cost of doing business." *Prosser & Keeton* § 69, at 500; *see also Head & Amory v. Providence Ins. Co.*, 6 U.S. 127, 156 (1804).

The 1818 *Chestnut Hill* case explicitly rejected the argument that corporations, unlike other principals, were exempt from liability for the torts of their servants.[20] 4 Serg. & Rawle 6. The court held the corporation liable for its servants' trespass because

---

[20] The court ignored the defendant's appeal to John Kyd's treatise, which mirrored Blackstone's in exempting corporations from liability for personal injuries. *See* 4 Serg. & Rawle at 8.

"[t]he rule between corporations and their servants, is substantially the same, as between individuals and their servants."[21] *Id.* at 11; Joseph K. Angell & Samuel Ames, *Treatise on the Law of Private Corporations Aggregate* § 310 (6th ed. 1858); *Bank of Columbia v. Patterson's Adm'r*, 11 U.S. 299, 305 (1813) ("acts" of corporate agent "within the scope of his authority, would be binding on the corporation"); *The General Steam Navigation Co. v. Guillou*, (1843) 152 Eng. Rep. 1061; 11 M. & W. 877 (under English corporate law, corporate director may present affirmative defense that corporation alone is liable for actions of corporate servants).

Chestnut Hill stands for a general proposition: corporate liability is an allocation of loss to the corporation for its agents' tort violations. The court decried the "mischievous" consequences of demanding plaintiffs seek remedy from "laborers who have no property to answer the damages." 4 Serg. & Rawle at 17; *see* Schwartz, at 650 (*Chestnut Hill* part of movement

---

[21] Courts did not limit tort liability to acts authorized by the corporation's charter because a "master is responsible for the [illegal] acts of the servant, not because he has given him an authority to do an illegal act, but from the relation subsisting between them." *Chestnut Hill*, 4 Serg. & Rawle at 12; *see Wilson v. Rockland Mfg. Co.*, 2 Del. 67, 67 (Del. Super. Ct. 1836) (corporation liable for servant's negligence); *Townsend v. Susquehanna Tpk. Rd. Co.*, 6 Johns. 90, 90 (N.Y. Sup. Ct. 1810) (same); James Grant, *A practical treatise on the law of corporations in general* 278 (1854) ("a corporation is liable in tort for the tortious act of their agent, though not appointed by their common seal, if such act be done in the course of his ordinary service").

to "modernize the rules of corporate liability" and allocate losses to corporate principals). Like precursor juridical entities – the East India Company and ships – corporations became liable for their agents' torts without regard to the *source* of the substantive norm of conduct. As such, corporate tort liability did not exclude liability for agents' torts in violation of the law of nations.

CONCLUSION

To exempt corporate defendants from ATS suits contravenes the text, history, and purpose of the statute, the law of nations, and the historical approach endorsed by this Court in *Sosa*. *Amici* urge this Court to grant petitioners' writ of certiorari to correct the decision of the court below.

Respectfully submitted,

TYLER R. GIANNINI
Counsel of Record
SUSAN H. FARBSTEIN
INTERNATIONAL HUMAN RIGHTS CLINIC
HARVARD LAW SCHOOL
Pound Hall 401
1563 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-9263
giannini@law.harvard.edu
Attorneys for Amici Curiae

June 17, 2011

APPENDIX A

LIST OF *AMICI CURIAE**

William R. Casto
Paul Whitfield Horn University Professor
Texas Tech University School of Law
1802 Hartford Avenue
Lubbock, TX 79409

William R. Casto is a Paul Whitfield Horn University Professor, which is the highest honor that Texas Tech University may bestow on members of its faculty. He has written three well-received books: *The Supreme Court in the Early Republic* (1995), *Oliver Ellsworth and the Creation of the Federal Republic* (1997), and *Foreign Affairs and the Constitution in the Age of Fighting Sail* (2006). He has also written numerous articles on judicial review, foreign policy, and the relationship between religion and public life in the Founding Era. He is a member of the American Law Institute. The United States Supreme Court has cited his works many times.

Martin S. Flaherty
Leitner Family Professor of
International Human Rights
Fordham Law School
33 West 60th Street
New York, NY 10023

Martin S. Flaherty is the Leitner Family Professor of Law and Co-Founding Director of the Leitner Center

---

* Affiliations are provided for identification purposes only.

for International Law and Justice at Fordham Law School. He is also a Visiting Professor at the Woodrow Wilson School of Public and International Affairs at Princeton University, where he was a Fellow in the Program in Law and Public Affairs. Flaherty's publications focus on constitutional law and history, foreign affairs, and international human rights and have appeared in such journals as the *Columbia Law Review*, the *Yale Law Journal*, the *Michigan Law Review*, and the *University of Chicago Law Review*. Formerly chair of the New York City Bar Association's International Human Rights Committee, he is also a member of the Council on Foreign Relations.

Robert W. Gordon
Chancellor Kent Professor of Law and Legal History
Yale Law School
Box 208215
New Haven, CT 06520

Robert W. Gordon is the Chancellor Kent Professor of Law and Legal History at Yale Law School. His subject areas are contracts, American legal history, evidence, the legal profession, and law and globalization. His publications include *The Legacy of Oliver Wendell Holmes* (1992), *Storie Critiche del Diritto* (Critical Legal Histories) (1995), and "The Legal Profession," in *Looking Back at Law's Century* (2002).

Nasser Hussain
Associate Professor of Law,
Jurisprudence and Social Thought
Amherst College
106 Clark House
Amherst, MA 01002

Nasser Hussain teaches at Amherst College in the Department of Law, Jurisprudence and Social Thought. Previously he was a member of the Society of Fellows at Harvard University. He is the author of *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (2003). His articles have appeared in a variety of journals, including the *Law and Society Review*, the *Boston Review*, and the *Stanford Law Review*.

John V. Orth
William Rand Kenan, Jr. Professor of Law
University of North Carolina School of Law
100 Ridge Road
Chapel Hill, NC 27599

John V. Orth is the William Rand Kenan, Jr. Professor of Law at the University of North Carolina. He is the author of *The Judicial Power of the United States: The Eleventh Amendment in American History* (1987), *Combination and Conspiracy: The Legal History of Trade Unionism, 1721-1906* (1991), *Due Process of Law: A Brief History* (2003), and *How Many Judges Does it Take to Make a Supreme Court? and Other Essays on Law and the Constitution* (2006), as well as numerous scholarly articles. He was an associate editor (for law) of the American National Biography and contributed to that series, as well as to the Oxford

Companion to the Supreme Court of the United States, the Oxford Companion to American Law, the Oxford International Encyclopedia of Legal History, and the Yale Dictionary of Legal Biography. His publications have been cited by federal and state courts, including the United States Supreme Court.